IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 330 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : YES

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MANOJBHAI BHAGWANDAS SHAH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 330 of 2000

MR JB PARDIWALA for Petitioner No. 1

MR ADIL MEHTA for Petitioner No. 1

MR HH PATEL, A.P.P. for Respondent No. 1

MR KANUBHAI I PATEL for Respondent No. 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 17/08/2001

C.A.V. JUDGEMENT

1. In this Revision the order of Shri S.D.Dave, Special Judge, Ahmedabad, is under challenge. Under the

impugned order he has rejected the final report submitted by the Anti Corruption Bureau (for short "A.C.B.") and issued summons to the revisionist u/s.190 of the Code of Criminal Procedure (for short "Cr.P.C.").

2. The brief facts are that the complainant Nayanbhai K. Patel lodged F.I.R. on 27.3.1998 before A.C.B. against the revisionist. Allegations of corruption were made against the revisionist which were investigated by the A.C.B. and ultimately it was revealed during investigation that there was no evidence to file charge-sheet against the accused revisionist. Accordingly final report was submitted. On receipt of final report the Special Judge issued notice to the complainant. The complainant appeared through Advocate Shri K.I.Patel and filed protest petition Ex.8 with zerox copies of Judgments. Additional list of documents was also produced by the complainant. After perusing the final report and the documents, running in 300 pages, the Special Judge found that it was not a case for acceptance of final report. Accordingly he took cognizance of the offence u/s.190(1)(b) or 190(1)(c) of the Cr.P.C. Accordingly summons was issued to the accused revisionist. It is therefore this Revision.

3. The only short point urged by Shri J.B.Pardiwala, learned Counsel for the revisionist in this revision was that since the revisionist is a public servant working as Deputy Manager, Union Bank of India, Varachha Road, Surat, cognizance of the offences allegedly committed by him could not be taken by the Special Judge without prior sanction of the Competent Authority. He has placed reliance upon Section 19(1) of the Prevention of Corruption Act.

4. Before dealing with this argument it will be necessary to point out the objections taken by Shri K.I. Patel, learned Counsel for the complainant who was given hearing by me. The first objection has been that the word "shall" used in Section 19(1) is not mandatory, but directory. The second objection is that no sanction is required in the instant case on the facts and circumstances of the case in view of the provisions contained in Section 19(3) of the Prevention of Corruption Act.

5. Before dealing with these objections it is necessary to point out from the impugned order that the learned Special Judge has not at all applied his mind under which provision he was taking cognizance of the offence and he was also not sure whether he was taking

cognizance of the offence or offences alleged to have been committed by the revisionist or he took cognizance of the revisionist. In Para : 10 of the impugned judgment the Special Judge has mentioned that it is a case for taking cognizance of the offence u/s.190(1)(b) or Section 190(1)(c) of the Cr.P.C. which shows that he was not sure under which section he was taking cognizance. The operative portion of the order shows that he has not taken cognizance of the offence alleged to have been committed by the revisionist rather he has taken cognizance of the revisionist. This is clear from the operative portion of the order itself where without specifying as to which prima facie offence was committed by the accused, he has directed that summons be issued against the accused. It, therefore, implies that he has taken cognizance of the offender and not the offence which is prohibited u/s.190 of the Cr.P.C.

6. Section 190(1) of Cr.P.C. provides that subject to the provisions of this chapter any Magistrate of the First Class and any Magistrate of the Second Class, specially empowered in this behalf under Sub-Section 2 may take cognizance of any offence. The Legislature never intended that cognizance of the offenders should be taken rather cognizance of the offence alleged to have been committed by the offender is to be taken u/s.190(1) Cr.P.C. There is thus patent illegality committed by the Special Judge in taking Cognizance of the offender viz. the revisionist and not taking cognisance of the offence.

7. It appears from the Memo of Revision that the F.I.R. was lodged against the revisionist u/s.7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act. In the impugned order it is not specified that prima facie after rejection of final report the Special judge found that the accused revisionist committed offences under these sections or under any of these sections. The order being ambiguous becomes illegal and it exhibits non-application of mind to the F.I.R. and to the final report submitted by the Police.

8. Further irregularity is noticed in the impugned order inasmuch as the Special judge has simply mentioned that he had perused complete report and accompaniments which runs into about 300 pages. It is not the bulk of evidence, oral or documentary, which matters, rather the quality of evidence. There is no whisper in the lengthy order running in 7 pages that the Special Judge after rejecting final report submitted by the A.C.B. found from the additional material that offences either u/s.7

or u/s.13(1)(d) read with Section 13(2) of the Prevention of Corruption Act were prima facie committed by the revisionist.

9. In addition to the above defects found in the impugned order it is further noticed that the Special Judge did not take into consideration whether cognizance could be taken in such cases without previous sanction or not. This, therefore, takes me to the consideration of various provisions of the Cr.P.C. and Prevention of Corruption Act.

10. The Special Judge might be justified in rejecting the final report submitted by the Police. It is not obligatory for him to accept the final report. However, if the complainant on filing protest petition could have brought additional evidence that it was a case for taking cognisance in that event some reason should have been given by the Special Judge as to what offences were prima facie committed by the accused and under which section of the Prevention of Corruption Act cognizance of the offence committed by the accused could be taken.

11. Cognizance is taken u/s. 190 of the Cr.P.C. There are three modes in which cognizance can be taken, viz. (1) upon receiving complaint of facts which constitutes such offence, (2) upon a police report of such fact, and (3) upon information received from any person other than the Police officer or upon his own knowledge of the Magistrate or a Special Judge that such offence has been committed. It is not a case where Section 190(1)(a) of Cr.P.C. is applicable because no complaint was given directly by the complainant to the Special Judge regarding commission of offence by the revisionist. It was also not a case where information was received by the Special Judge from any person other than the Police officer or upon his own knowledge. As such Section 190(1)(c) Cr.P.C. is not attracted. It was a case covered by Section 190(b) of the Cr.P.C. because the F.I.R. was lodged with the police viz. the A.C.B. and ultimately after investigation the A.C.B. submitted a final report. If the final report was rejected by the Special Judge he had no option but to make compliance as required under Sections 200 to 204 of Cr.P.C. before issuing process. There is no compliance of Section 200 Cr.P.C. because after rejection of final report the complainant was not examined. It is also not a case where the Special Judge postponed issuing process and decided to make further enquiry either himself or directed investigation to be made by a Police Officer or by such person as he though fit. Under Sec. 202(1)

Cr.P.C. the Special Judge could have invoked the powers provided u/s.156(3) Cr.P.C. It was not a case where complaint was dismissed hence Section 203 Cr.P.C. is not applicable. Section 204 Cr.P.C. was made applicable because process was ordered to be issued, but there is no mention in the order that in the opinion of the Special Judge there is sufficient ground for proceeding against the revisionist. Even if he decided to issue process without making such observation it was necessary for him to consider the provisions of Section 19(1) and 19(3) of the Prevention of Corruption Act.

12. Section 19(1) of the Prevention of Corruption Act provides that no Court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by the public servant except with the previous sanction. It is not a case covered by clauses (a) & (b) of Sub-Section (1) of Section 19 inasmuch as the revisionist is not employed with the affairs of the Union or the State. Clause (c) of Sub-Section (1) of Section 19 will be attracted and in view of this the sanctioning Authority will be the authority competent to remove the revisionist from his office. Thus, prima facie previous sanction for prosecution has to be obtained against the accused, but this was not done. The reason is obvious that the F.I.R. was lodged with the Police and ultimately after investigation final report was submitted. If the charge-sheet would have been submitted by the Police certainly prior sanction should have been obtained before submitting the charge-sheet, but since it was a case of final report the police could not have proceeded to obtain prior sanction. Since according to the police investigation no case was made out against the accused, final report was given and as such prior sanction was not taken and could not be taken. The complainant had no authority to apply for sanction because the matter was being investigated by the Police. However, after the protest petition and its acceptance and rejection of final report the question arises who is to obtain sanction before taking cognizance. Once the final report was rejected the Court, viz. Special Judge could not have applied for sanction. In the impugned order the Special judge has expressed desire that the Police will assist in prosecution of the accused. If that is so he could have directed the Police to obtain sanction or he could have directed the complainant to obtain sanction and then further proceeding could have been taken by the Special Judge. That was not done in the instant case. On the other hand straightway cognizance of the accused was taken and not of the offence and the accused was

summoned without specifying what offence was committed by him. This is also procedural irregularity which amounts to illegality in the impugned order.

13. Shri K.I.Patel, representing the complainant, however, placed reliance upon Section 19(3)(a) of the Prevention of Corruption Act and argued that previous sanction contemplated u/s.19 is not mandatory, rather it is directory in view of the provisions contained in Section 19(3)(a) of the Act. Section 19(3)(a) of the Act provides that no finding, sentence or order passed by a Special judge shall be reversed or altered by a Court in Appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby.

14. Referring to this provision Shri Patel contended firstly that the revision itself is not maintainable and secondly that the findings recorded by the Special Judge cannot be reversed in revision. I do not find force in either of these contentions. The question whether the provisions of Section 19(1) are mandatory or directory is not required to be discussed at length. Prima facie there is no force in the contention of Shri K.I.Patel that in view of sub-section 3 of Section 19 the revision is not maintainable. Needless to say that maintainability of revision is one thing and success or failure of revision is another thing. There is no indication from Section 19(3)(a) of the Act that the revision itself will not be maintainable. If the contention of Shri Patel is to be accepted then even the Appeal or proceeding for confirmation of sentence will also be not maintainable. The only prohibition contained in clause (a) of Sub-section (3) of Section 19 is that the finding, sentence or order passed by the Special Judge shall not be reversed or altered inter-alia in revision on the ground of absence of or any error or omission or irregularity in the sanction required under sub-section (1), unless in the opinion of that court failure of justice has in fact been occasioned thereby. In the case before me it cannot be said that failure of justice has been occasioned because immediately after passing of order for issuance of summons the revision has been filed. Objection has been raised by the accused at the earliest stage and as such it cannot be said that failure of justice has been occasioned to the accused. It is certainly a case where no sanction has been obtained, but it could not be obtained for the reasons stated above that final report was rejected and then

straightway process was issued against the accused. The Court, namely, the Special judge could not have applied for sanction, but he could have directed either the Police or the complainant to obtain sanction. That direction has not been given hence interference in this revision is required. It cannot be accepted that the trial can proceed in the absence of sanction or that the prosecution or the complainant can not obtain sanction at a subsequent stage after the direction to issue process against the accused revisionist has been given by the Special Judge.

15. In view of above discussions it is clear that confused and illegal order has been passed by the Special Judge which requires interference.

16. The Revision, therefore, succeeds and is allowed. The impugned order of the Special Judge is hereby set aside. The case is remanded to the Special judge with direction that after rejecting the final report he shall proceed to take cognizance in the manner prescribed u/ss. 200, 202 and 204 of the Cr.P.C. In the mean time he can also direct the police agency to obtain sanction or can also direct the complainant to obtain sanction and after the sanction is filed further proceeding shall be commenced against the accused revisionist. If no sanction is obtained or filed the Special Judge can not proceed in the matter any further and he shall pass suitable orders in accordance with law.

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Date : August 17, 2001 (D. C. Srivastava, J.)

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